

# NORTHWEST ENVIRONMENTAL ADVOCATES



May 5, 2015

FOIA Officer  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue, Suite 900  
ETPA-124  
Seattle, Washington 98101

*Filed Via FOIA Online*

**Re: Freedom of Information Act Request**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA). This request is a follow-up to FOIA Nos. EPA-R10-2013-009195 and EPA-HQ-2013-009194 (closed and subsumed into -009195), submitted on August 19, 2013.

NWEA is a non-profit, 501(c)(3), environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon as well as nationally. The organization has a long history of interest and involvement in environmental issues, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This request pertains to the state of Oregon's Coastal Nonpoint Pollution Control Program that Oregon has been developing pursuant to the Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. § 1544b (CZARA). An earlier and identical request in content and scope, sent August 19, 2013, has not yet been answered. In discussing how EPA might respond to that request, however, NWEA agreed to records generated or received by EPA on or before January 15, 2014. *See* Email from Paul Kampmeier, Washington Forest Law Center, to Jennifer Byrne, EPA Re: Northwest Environmental Advocates' FOIA Request # 2013-009195 (Jan. 15, 2014). Therefore, this request seeks all documents generated or received by EPA subsequent to January 15, 2014.

## **I. FOIA Request**

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please

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[www.NorthwestEnvironmentalAdvocates.org](http://www.NorthwestEnvironmentalAdvocates.org)

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identify which documents correspond to which requests below. This request also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide all documents prepared or utilized by, in the possession of, or routed through EPA since January 15, 2014 related to:

1. The State of Oregon's Coastal Nonpoint Pollution Control Program that Oregon has been developing pursuant to the Coastal Zone Act Reauthorization Amendments of 1990, 16 U.S.C. § 1544b (CZARA).

If there are large documents that you suspect we may already have, please feel free to call us and ask in order to avoid waste and/or delay. If there are any other materials or categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request. In addition, please exclude from this request those documents that are available to the public on the National Oceanic and Atmospheric Administration Office of Coastal Management's website including the following:

- Public Comments Received on Proposed Findings
- Oregon's Response to Proposed Findings (3/20/2014)
- Cover Letter for January 30, 2015 Findings Document (1/30/2015)
- Finding that Oregon Has Not Submitted a Fully Approvable Program (1/30/2015)
- Response to Comments on Proposed Finding (1/30/2015)
- Docket for Finding that Oregon Has Not Submitted a Fully Approvable Program (1/30/2015)

See Oregon, Decision Memos for State Programs, Coastal Nonpoint Pollution Control Program, at <http://coast.noaa.gov/czm/pollutioncontrol/?redirect=301ocm#Oregon>.

EPA employees Dave Powers (retired), Dan Opalski, Christine Psyk, and Alan Henning may have or know where to find documents responsive to this request. If you have documents that meet the terms of this request but believe they are not disclosable, please provide a list of such documents and an explanation of any such determination on your part. Also, please indicate if and where you have redacted any information from disclosed documents and/or if you do not have any of the information or documents requested.

## II. Fee Waiver Request

Because NWEA is a non-profit, public interest organization, I hereby request a waiver of any fees associated with this request pursuant to 40 C.F.R. § 2.107(l). EPA has previously granted FOIA fee waivers to NWEA, including for an identical request; I respectfully request that EPA do so again for this request. As we pointed in an appeal of the initial denial of a fee waiver,

The FOIA request included an extensively supported request to waive fees. On August 23, 2013 the fee waiver was denied on the basis that NWEA allegedly failed to demonstrate “a specific intent to disseminate the information to the general public.” This determination was made by EPA despite NWEA’s clearly expressed intent to disseminate the information to the public set out in the fee waiver request, leading us to conclude that EPA’s denial of the fee waiver request is a form of harassment and contrary to President Obama’s Executive Order on FOIA. *See* The White House, President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies at <http://www.whitehouse.gov/the-press-office/freedom-information-act> (hereinafter “Presidential Memo”). EPA then declined to evaluate any other aspects of NWEA’s fee waiver but, even so, concluded that an appeal should “address all factors required by EPA’s FOIA Regulations, located at 40 C.F.R. § 2.107(1).” It is our view that it is illogical to both not process our fee waiver in its entirety and to hold us to appeal a decision that has not yet been made. Nonetheless we will do so.

Letter from Nina Bell, NWEA to EPA FOIA and Privacy Branch, Re: Appeal of Denial of Fee Waiver Request and Denial of Request for Expedited Processing: FOIA No. EPA-R10-2013-009195 (Sept. 13, 2015). We include this excerpt from our successful appeal of the fee waiver denial to make the point that while we fully expect EPA to reject our fee waiver and to force us through the process of making an appeal, we object to this harassment tactic. Because, apparently, EPA may not have read the memorandum from President Obama, we are quoting part of it here:

In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Presidential Memo.

Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii). In addition to the material below we incorporate by reference and attach hereto a copy of our fee waiver appeal for FOIA No. EPA-R10-2013-009195.

The FOIA requires agencies to waive fees associated with a request for information if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the

commercial interest of the requester. *See* 5 U.S.C. § 552(a)(4)(A)(iii). The fee waiver provisions of FOIA are to be liberally construed and applied. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). As discussed in the proceeding paragraphs, a fee waiver is appropriate because disclosure of the requested information and documents is in the public interest: it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of NWEA.

First, this request seeks documents and information that directly concern identifiable operations and activities of the federal government. *See* 40 C.F.R. § 2.107(l)(2)(i). The requested documents relate to how the federal government implements CZARA and regulates nonpoint source pollution in coastal areas. For responsive documents or information developed outside of the government, responsive documents likely inform how EPA is carrying out its regulatory, enforcement, and other activities. Clearly the requested documents and information concern identifiable operations and activities of the federal government.

Second, disclosure of the requested documents and information will contribute to, and significantly further, public understanding by informing a reasonably broad audience of persons interested in the subject. *See* 40 C.F.R. § 2.107(l)(2)(iii) and (iv). So far as NWEA can tell, requested documents are not already in the public domain and so disclosure will necessarily lead to better understanding of EPA's regulatory activities. Indeed, since 1998, very little information has been made publicly available regarding EPA's view of the Coastal Nonpoint Pollution Control Program in Oregon with the exception of documents posted on the National Oceanic and Atmospheric Administration Office for Coastal Management website referred to above. Consequently, absent disclosure of these records, the public is left largely to speculate about EPA's regulatory role and the resulting and/or potentially unregulated environmental impacts. Given the complexity of the legal issues and the scarcity of publicly available information, the public's understanding of government operations will be significantly greater after disclosure of the requested documents.

Indeed, NWEA has the ability and intention to disseminate disclosed documents and information to large segments of the public. NWEA is likely to communicate disclosed information to its members through websites, newsletters, and action alerts. NWEA communicates regularly with its members, who live and recreate throughout the Pacific Northwest. Additionally, NWEA maintains a website through which it regularly communicates information to interested citizens and the public ([www.northwestenvironmentaladvocates.org](http://www.northwestenvironmentaladvocates.org)). NWEA intends to review and publicize some of the disclosed information through its website-the regularly-updated home page, as well as the "document library," "action alerts," "programs," and "getting involved," elements.

NWEA has used numerous documents previously disclosed under an identically-worded FOIA request to EPA as the basis for letters in which NWEA has summarized for public consumption the views of the various agencies contained in those documents. *See e.g.*, Letters to EPA and NOAA Re: Oregon Coastal Nonpoint Pollution Control Program: EPA and NOAA's Interim Approval of Agricultural Management Measures for Oregon (May 2, 2012) *available at* [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA%20ag\\_letter\\_%20201205.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA%20ag_letter_%20201205.pdf); Oregon Coastal Nonpoint Pollution Control Program: EPA and NOAA's Interim Approval of Agricultural Management Measures for Oregon are Based on a Flawed Understanding of the State's Enforcement Authority (June 13, 2012) *available at*

[http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA\\_%20ag\\_letter\\_enforce\\_20120613.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA_%20ag_letter_enforce_20120613.pdf); Oregon Coastal Nonpoint Pollution Control Program; EPA's and NOAA's Interim Findings on Pesticides (August 20, 2012) *available at* [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA\\_fed\\_letter\\_pesticide%20petition\\_20120820.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA_fed_letter_pesticide%20petition_20120820.pdf); Oregon Coastal Nonpoint Pollution Control Program; Protection of the Designated Use of Amphibians in Non-Fish-Bearing ("Type N") Streams Through the Midcoast Implementation Ready TMDL (October 5, 2012) *available at* [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/OR\\_MidCoast\\_TMDL\\_fed\\_letter\\_Amphibian\\_20121003.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/OR_MidCoast_TMDL_fed_letter_Amphibian_20121003.pdf); and Oregon Coastal Nonpoint Pollution Control Program; Additional Information Concerning Oregon's Failure to Regulate Agricultural Nonpoint Pollution (May 10, 2013) *available at* <http://northwestenvironmentaladvocates.org/nweafiles/2013/05/CZARA%20Letter%20to%20Federal%20Agencies%20re%20Agriculture%205%202013%20%282%29.pdf>. NWEA has brought information to the attention of elected officials, agency management and staff, and other public servants through dissemination of these letters.

Likewise, based on the documents previously disclosed by EPA in response to NWEA's FOIA request, NWEA petitioned the Oregon Environmental Quality Commission to adopt rules to address weaknesses in its coastal nonpoint program. *See* Petition to Initiate Rulemaking and Take Other Actions to Protect Existing and Designated Uses of Fish and Wildlife From Point and Nonpoint Sources of Pollution, *available at* [http://www.northwestenvironmentaladvocates.org/nweafiles/Pesticide%20Petition%20FINAL\\_20120809.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/Pesticide%20Petition%20FINAL_20120809.pdf). Moreover, by bringing weaknesses to the attention of EPA and NOAA that were revealed in the previously-released documents, NWEA was able to convince EPA and NOAA to change its position and include pesticides as an open issue in Oregon's program. *See* Letter from Dick Pedersen, Director, Oregon Department of Environmental Quality and Jim Rue, Director, Oregon Department of Land Conservation and Development to Dan Opalski, EPA, and Margaret Davidson, NOAA, July 1, 2013 *available at* <http://www.deq.state.or.us/wq/tmdls/docs/midcoast/CZARAsignedletter.pdf> (in which reference is made to a May 29, 2013 email from Christine Psyk, EPA, to Greg Aldrich, Oregon DEQ, noting that Oregon must "ensure the adequacy of stream buffers for the application of certain chemicals.")

NWEA filed extensive comments on the proposed finding that Oregon has not submitted an approvable program. *See* <http://northwestenvironmentaladvocates.org/blog/wp-content/uploads/2014/03/NWEA-Comments-on-Oregons-CNPCP-51.pdf>. NWEA also used materials obtained through previous FOIA requests to provide a variety of fact sheets to the public. *See e.g.*, <http://northwestenvironmentaladvocates.org/blog/wp-content/uploads/2014/01/How-to-Comment-on-CZARA-4-pages1.pdf>; <http://northwestenvironmentaladvocates.org/blog/wp-content/uploads/2014/01/How-to-Comment-on-CZARA-Pesticides1.pdf>.

NWEA intends to publicize some of the disclosed information through public testimony and its work with state and federal agencies. NWEA regularly participates in public processes involving environmental issues and expects to use disclosed information to educate agency officials, elected officials, reporters, and others about the water quality and environmental impacts associated with the coastal nonpoint pollution control plan in Oregon. NWEA also fully intends to communicate disclosed information to its friends in the non-profit community and doing so will enhance the level of public understanding about the relevant government operations. Indeed, NWEA is viewed as the primary source of information concerning the CZARA program in Oregon. Having the documents will assist NWEA in helping that portion of

the general public that is concerned about nonpoint source pollution in the state's coastal watersheds— whether logging, farming, or pesticide spraying— to continue to participate in the process of Oregon's achieving a fully approvable coastal nonpoint program. For these reasons, disclosing the requested documents will significantly further public understanding of EPA's regulatory activities by helping inform a reasonably broad audience of interested persons.

Finally, disclosure is not primarily in the commercial interest of NWEA. *See* 40 C.F.R. § 2.107(l)(3). As a non-profit organization, NWEA has no commercial interest that could be furthered by disclosure. NWEA does not intend to sell the requested documents once obtained, nor does NWEA expect to disseminate the information in any way that would directly generate funds for NWEA. Instead, NWEA seeks the information to help educate the public and interested non-profit organizations. Even if NWEA had a commercial interest, disclosure is not primarily in that interest; rather, NWEA's primary interest in the requested documents is to allow it to better understand EPA's regulatory activities in controlling nonpoint source pollution in coastal areas in Oregon.

Accordingly, please waive all fees associated with the search, review, and production of documents and information responsive to this request.

### **Conclusion**

Please contact me if you have any questions about this request, particularly about the scope or identity of the documents requested.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized, flowing script.

Nina Bell  
Executive Director

Attachment: NWEA Appeal of Denial of Fee Waiver Request and Denial of Request for Expedited Processing: FOIA No. EPA-R10-2013-009195

# NORTHWEST ENVIRONMENTAL ADVOCATES



September 13, 2013

U.S. Environmental Protection Agency  
FOIA and Privacy Branch  
1200 Pennsylvania Ave., N.W.  
Washington, D.C., 20460

*Via E-Mail only:* FOIA\_HQ@epa.gov

Re: **Appeal of Denial of Fee Waiver Request and Denial of Request for Expedited Processing: FOIA No. EPA-R10-2013-009195**

To whom it may concern:

On August 19, 2013 the Washington Forest Law Center submitted a Freedom of Information Act (FOIA) request to EPA Region 10, via FOIA Online, on behalf of Northwest Environmental Advocates (NWEA) seeking documents pertaining to the State of Oregon's Coastal Nonpoint Pollution Control Program. The FOIA request included an extensively supported request to waive fees. On August 23, 2013 the fee waiver was denied on the basis that NWEA allegedly failed to demonstrate "a specific intent to disseminate the information to the general public." This determination was made by EPA despite NWEA's clearly expressed intent to disseminate the information to the public set out in the fee waiver request, leading us to conclude that EPA's denial of the fee waiver request is a form of harassment and contrary to President Obama's Executive Order on FOIA. *See* The White House, President Barack Obama, Memorandum for the Heads of Executive Departments and Agencies at <http://www.whitehouse.gov/the-press-office/freedom-information-act>. EPA then declined to evaluate any other aspects of NWEA's fee waiver but, even so, concluded that an appeal should "address all factors required by EPA's FOIA Regulations, located at 40 C.F.R. § 2.107(1)." It is our view that it is illogical to both not process our fee waiver in its entirety and to hold us to appeal a decision that has not yet been made. Nonetheless we will do so.

The request also sought expedited processing, a request that was also denied. This appeal letter includes an appeal of the denial for expedited processing. NWEA requests that EPA address the fee waiver appeal either prior to or concurrent with the appeal on expedited processing so that the latter does not actually result in further delays, an outcome that would be the opposite of the expedited processing that has been sought.

## **I. Appeal of Denial of Request for Fee Waiver**

Before providing you with the information to support our appeal, we wish to make three points in response to your August 23 letter. First, your letter inhibits efficient resolution of EPA's concerns because it utterly fails to explain why you believe NWEA's fee waiver request is insufficient and what additional information you need to approve the fee waiver. EPA's summary denial letter was clearly not "reasonably calculated" to put NWEA on notice of the deficiencies in its case, as required. *Friends of the Coast Fork v. U.S. Department of the*

*Interior*, 110 F.3d 53, 55 (9th Cir. 1997) (“the government’s denial letter must be reasonably calculated to put the requester on notice as to the deficiencies in the requester’s case”). In our August 19, 2013 FOIA request, NWEA specifically addressed each fee waiver factor. Your letter, on the other hand, stands in stark contrast – it is EPA’s letter that lacks sufficient information, not NWEA’s – and by doing so prevents NWEA from efficiently addressing issues about which you are ostensibly concerned.

Second, EPA’s approach to NWEA’s fee waiver request appears inconsistent with the requirements of the FOIA. Courts have consistently recognized that Congress intended the fee waiver provisions to “be liberally construed in favor of waivers for noncommercial requesters.” See, e.g., *Forest Guardians v. Department of Interior*, 416 F.3d 1173, 1177-78 (10th Cir. 2005); *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987). One court stated:

Finally, I note that strong policy considerations support a fee waiver in this case. The legislative history discussed in *McClellan*, *supra* [cites omitted], and other cases demonstrates that Congress intended independent researchers, journalists and public interest watchdog groups to have inexpensive access to government records in order [t]o provide the type of public disclosure believed essential to our society. Moreover, in the 1986 amendments to FOIA, Congress ensured that when such requesters demonstrated a minimal showing of their legitimate intention to use the requested information in a way that contributes to public understanding of the operations of government agencies, no fee attaches to their request.

*Institute for Wildlife Protection v. U.S. Fish and Wildlife Service*, 290 F. Supp. 2d 1226, 1232 (2003). Accordingly, both the U.S. Court of Appeals for the Ninth Circuit and the U.S. Court of Appeals for the D.C. Circuit have stated that the main purpose of the fee-waiver is “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Judicial Watch, Inc.*, 326 F.3d at 1311; see also *McClellan Ecological Seepage Situation*, 835 F.2d at 1284.

Given the “minimal showing” needed to obtain a fee waiver, and in light of NWEA’s recent experiences with EPA in other FOIA requests, EPA’s July 19 letter creates the appearance of arbitrary and capricious agency action. Indeed, it appears to NWEA that EPA may be using fee waiver denials to avoid the requirements of FOIA and President Obama’s Executive Order on FOIA. EPA’s August 23 letter in this matter reinforces our impression that EPA has denied our fee waiver request not because it needs more information but for some other reason. It also creates the impression that EPA has forgotten, or is ignoring, the reasons for the fee waiver provisions and the minimal showing needed to obtain a fee waiver. To avoid these problems, NWEA requests that in response to this letter EPA keep in mind that NWEA must only make a minimal showing to obtain the fee waiver.

Third, EPA appears to be developing a pattern and practice of denying NWEA’s fee waiver requests on the basis that NWEA has failed to express an intent to disseminate the information to the general public, despite all evidence to the contrary, waiting for NWEA’s appeal, and then granting the appeal even though there is little or no additional information provided in the appeal than there was in the original request. For example, EPA denied a fee waiver request for FOIA No. 10-2013-004864 submitted on March 25, rejected on the same grounds on April 12, appealed



on April 22, 2013, apparently lost or misplaced, and granted on June 24, 2013. Likewise, EPA denied a fee waiver request for FOIA No. EPA-R1-2013-008330 submitted on July 19, 2013, denied the same day on the same grounds, and subsequently granted on August 21, 2013.

NWEA appeals the instant denial of a fee waiver on the basis that it meets the EPA regulatory requirements. EPA regulations provide for a fee waiver to be granted when “a FOI Office determines, based on all available information, that disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 40 C.F.R. § 2.107(l)(1). As set out in EPA’s FOIA regulations:

To determine whether the first fee waiver requirement is met, FOI Offices will consider the following factors:

- (i) The subject of the request: Whether the subject of the requested records concerns “the operations or activities of the government.” The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.
- (ii) The informative value of the information to be disclosed: Whether the disclosure is “likely to contribute” to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.
- (iii) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to “public understanding.” The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public will be considered. It will be presumed that a representative of the news media will satisfy this consideration.
- (iv) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. FOI Offices will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is

“important” enough to be made public.

40 C.F.R. § 2.107(l)(2)(i)-(ii). These are, of course, the relevant issues cited in your August 23 letter. And, as demonstrated below and in our original FOIA fee waiver request, NWEA’s request meets all of these criteria and so warrants a fee waiver.

#### **A. Intent to Disseminate**

EPA’s denial of this fee waiver request is entirely unfounded. The original fee waiver request did, in fact, state an intent to disseminate the information sought. Additionally, NWEA asserted and hereby reasserts that it has an intent to share the records sought with nonprofit organizations and others who might be interested, including state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. The fee waiver request stated that NWEA

has the ability and intention to disseminate disclosed documents and information to large segments of the public. NWEA is likely to communicate disclosed information to its members through websites, newsletters, and action alerts. NWEA communicates regularly with its members, who live and recreate throughout the Pacific Northwest. Additionally, NWEA maintains a website through which it regularly communicates information to interested citizens and the public ([www.northwestenvironmentaladvocates.org](http://www.northwestenvironmentaladvocates.org)). NWEA intends to review and publicize some of the disclosed information through its website-the regularly-updated home page, as well as the “document library,” “action alerts,” “programs,” and “getting involved,” elements.

EPA is well aware that if the documents are of interest to the general public and particularly if they are formal EPA documents, NWEA will post them directly on its website. For example, when EPA released otherwise difficult-to-attain letters in which EPA has authorized NPDES programs in states, NWEA posted them on its website, where they remain today. *See* NPDES Permit Program Authorization Letters, NWEA website, at <http://www.northwestenvironmentaladvocates.org/resources/NPDESPermitProgramAuthorizationLetters.htm>. Similarly, documents released by the State of Idaho are posted on NWEA’s website where records requested from EPA with regard to water quality trading will also be posted. *See* Update #2, Water Quality Trading: Innovation or Hoax?, NWEA website at [http://northwestenvironmentaladvocates.org/nweafiles/WQ\\_Trading/download\\_1/](http://northwestenvironmentaladvocates.org/nweafiles/WQ_Trading/download_1/). Documents related to this FOIA request will be posted in a special section of NWEA’s website that is helping people understand and prepare to submit public comments on EPA’s proposed action on Oregon’s Coastal Nonpoint Pollution Control Program. *See Oregon Coast Polluted Runoff*, NWEA website at <http://northwestenvironmentaladvocates.org/oregon-coast-polluted-runoff/>.

With regard to documents specifically related to the Oregon Coastal Nonpoint Pollution Control Program, NWEA has a long history of releasing information and analysis from documents obtained through previous identical FOIA requests to the public, federal and state agencies, and other interested parties. In its request for a fee waiver, NWEA stated that it

has used numerous documents previously disclosed under an identically-worded FOIA request to EPA as the basis for letters in which NWEA has summarized for public consumption the views of the various agencies contained in those

documents. *See, e.g.*, Letters to EPA and NOAA Re: Oregon Coastal Nonpoint Pollution Control Program: EPA and NOAA's Interim Approval of Agricultural Management Measures for Oregon (May 2, 2012) available at [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA%20ag\\_letter\\_%20201205.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA%20ag_letter_%20201205.pdf); Oregon Coastal Nonpoint Pollution Control Program: EPA and NOAA's Interim Approval of Agricultural Management Measures for Oregon are Based on a Flawed Understanding of the State's Enforcement Authority (June 13, 2012) available at [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA\\_%20ag\\_letter\\_enforce\\_20120613.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA_%20ag_letter_enforce_20120613.pdf); Oregon Coastal Nonpoint Pollution Control Program; EPA's and NOAA's Interim Findings on Pesticides (August 20, 2012) available at [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA\\_fed\\_letter\\_pesticide%20petition\\_20120820.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/CZARA_fed_letter_pesticide%20petition_20120820.pdf); Oregon Coastal Nonpoint Pollution Control Program; Protection of the Designated Use of Amphibians in Non-Fish-Bearing ("Type N") Streams Through the Midcoast Implementation Ready TMDL (October 5, 2012) available at [http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/OR\\_MidCoast\\_TMDL\\_fed\\_letter\\_Amphibian\\_20121003.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/2012/12/OR_MidCoast_TMDL_fed_letter_Amphibian_20121003.pdf); and Oregon Coastal Nonpoint Pollution Control Program; Additional Information Concerning Oregon's Failure to Regulate Agricultural Nonpoint Pollution (May 10, 2013) available at <http://northwestenvironmentaladvocates.org/nweafiles/2013/05/CZARA%20Letter%20to%20Federal%20Agencies%20re%20Agriculture%205%202013%20%282%29.pdf>. NWEA has brought information to the attention of elected officials, agency management and staff, and other public servants through dissemination of these letters.

FOIA Request at 3. This paragraph demonstrates that documents obtained through an identically worded FOIA request to EPA have been made available to outside parties including the general public, that NWEA has the capacity and intent to analyze and disseminate information from documents obtained through FOIA specifically on the issue of Oregon's Coastal Nonpoint Program, and that not only is NWEA asserting an intent to disseminate but it obviously fully intends to honor that assertion. In addition, NWEA makes EPA documents obtained through FOIA and other means available to the public and individuals through the use of Dropbox, an internet file sharing program.

NWEA's original fee waiver request went on to explain a purpose that previously obtained materials from an identically worded FOIA request supported:

Likewise, based on the documents previously disclosed by EPA in response to NWEA's FOIA request, NWEA petitioned the Oregon Environmental Quality Commission to adopt rules to address weaknesses in its coastal nonpoint program. See Petition to Initiate Rulemaking and Take Other Actions to Protect Existing and Designated Uses of Fish and Wildlife From Point and Nonpoint Sources of Pollution, available at [http://www.northwestenvironmentaladvocates.org/nweafiles/Pesticide%20Petition%20FINAL\\_20120809.pdf](http://www.northwestenvironmentaladvocates.org/nweafiles/Pesticide%20Petition%20FINAL_20120809.pdf). Moreover, by bringing weaknesses to the attention of EPA and NOAA that were revealed in the previously-released documents, NWEA was able to convince EPA and NOAA to change its position and include pesticides as an open issue in Oregon's program. See Letter from Dick Pedersen, Director, Oregon Department of Environmental Quality and Jim Rue, Director, Oregon Department of Land Conservation and

Development to Dan Opalski, EPA, and Margaret Davidson, NOAA, July 1, 2013 available at [http://www.deq.state.or.us/wq/tmdls/docs/midcoast/CZARA\\_signedletter.pdf](http://www.deq.state.or.us/wq/tmdls/docs/midcoast/CZARA_signedletter.pdf) (in which reference is made to a May 29, 2013 email from Christine Psyk, EPA, to Greg Aldrich, Oregon DEQ, noting that Oregon must "ensure the adequacy of stream buffers for the application of certain chemicals.")

FOIA Request at 3. A petition for rulemaking under a state Administrative Procedure Act is clearly dissemination of information and documents and supports NWEA's assertion that it intends to disseminate documents and information contained within them from an identically worded FOIA request.

Moreover, NWEA asserted that it intended to disseminate information through a specific means related to EPA's pending approval or disapproval of Oregon's Coastal Nonpoint Program:

NWEA also intends to publicize some of the disclosed information through public testimony and its work with state and federal agencies. NWEA regularly participates in public processes involving environmental issues and expects to use disclosed information to educate agency officials and others about the water quality and environmental impacts associated with the coastal nonpoint pollution control plan in Oregon. NWEA also fully intends to communicate disclosed information to its friends in the non-profit community and doing so will enhance the level of public understanding about the relevant government operations. Indeed, NWEA is viewed as the primary source of information concerning the CZARA program in Oregon. Given that a November 15, 2013 date for a proposed approval or disapproval of Oregon's program is upcoming, members of the public will be looking to NWEA for advice on how to participate in the public comment period for this proposed action. Having the documents will assist NWEA in helping that portion of the general public that is concerned about nonpoint source pollution in the state's coastal watersheds – whether logging, farming, or pesticide spraying -- to participate in this process. For these reasons, disclosing the requested documents will significantly further public understanding of EPA's regulatory activities by helping inform a reasonably broad audience of interested persons.

FOIA Request at 3-4. This is the purpose of the section of the NWEA website set up for helping the public participate in EPA's decisionmaking. See *Oregon Coast Polluted Runoff*, NWEA website at <http://northwestenvironmentaladvocates.org/oregon-coast-polluted-runoff/>.

In addition, NWEA asserts that it has been and may be again involved in litigation regarding Oregon's Coastal Nonpoint Program. As stated in the paragraph above, EPA and the National Oceanic and Atmospheric Administration are required to proposed to approve or disapprove Oregon's program by November 15, 2013, pursuant to settlement of litigation in *Nw. Env'tl. Advocates v. Locke, et al.*, Civil No. 09-0017-PK. Use of information sought through FOIA is a recognized public use and benefit under FOIA's fee waiver standard. Courts have long recognized that the use of such laws to further the public interest through challenges to agency action may actually represent some of the highest and best application of public access laws. For example, the Ninth Circuit has ruled that a FOIA requester established a *prima facie* justification for a fee waiver when "[i]n particular, they made it clear to [the agency] that they meant to challenge publicly the scientific basis for the western pond turtle listing denial." *Friends of the*

*Coast Fork v. U.S. Dept. of Interior*, 110 F.3d. 53, 55 (9th Cir.1997); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 143 n. 10 (1975) (evidence of prior litigation interest does not decrease right of access under FOIA). Indeed, almost 30 years ago, the federal court for the District of Columbia, citing Supreme Court precedent, ruled that “[l]itigation to seek redress of violation of law is a right established by the first amendment . . . and restrictions thereupon are subject to strict scrutiny.” *Idaho Wildlife Fed’n v. U.S. Forest Serv.*, Civ. No. 82-1206 (D.D.C. July 21, 1983) (citing *NAACP v. Button*, 371 U.S. 415 (1962)), Slip Op. at 7. In that case, the court rejected the Forest Service’s denial of a fee waiver request because it relied on a regulation that proscribed such waivers whenever the information was “sought for use in litigation against the federal government.” *Id.* at 3. The court ruled that such a proposition is “untenable” because:

The concept of the “private attorney general” is well-established, and certainly had its genesis in the environmental field. Indeed, when private litigation against a government agency vindicates a significant public policy and creates widespread benefit, policy en-courages such litigation by awarding the plaintiff attorney’s fees and costs.

*Id.* at 8 (citation omitted). The court noted that the Idaho Wildlife Federation “is a non-profit organization which states that its purpose in litigation against the Forest Service is to ensure compliance with environmental laws” and that “such activity would appear to be of the type generally considered to be public interest.” *Id.* Because policy-based disputes with agencies, as well as administrative challenges, “cannot be done completely without the ability to seek judicial review,” the court enjoined the Forest Service’s broad-brush rejection of fee waiver requests simply because they might interfere with an agency’s unfettered pursuit of its agenda. *Id.* at 8-9. Indeed, litigation to enforce federal laws is an essential function of organizations, such as and including NWEA, which act in a watchdog capacity. NWEA hereby asserts that the documents sought through this FOIA request may be the basis for litigation in the future.

Given that the fee waiver request that EPA denied explicitly stated an intent to disseminate the information to the public, we are at a loss as to understand what fee waiver request EPA has processed. Does EPA consider none of the people and organizations referenced above to be the “public”? Did EPA not read the original request? We surely cannot disseminate that which we do not yet possess. Yet just as surely, NWEA has demonstrated that it has the capacity and intent to disseminate both the documents requested and the information contained therein. In fact, we would go so far as to say that NWEA’s intent to disseminate is far greater than EPA’s own intent given EPA provides little or no information to the public concerning Oregon’s long-term failure to gain approval of its coastal nonpoint program.

**B. Whether the subject of the requested records concerns “the operations or activities of the government.”**

As the original fee waiver request established, the documents requested have significant regulatory import, they involve actions of the EPA, and they are not otherwise available to the public including NWEA. They concern the most obvious of government operations, decision-making pursuant to federal statute. We incorporate by reference the pertinent section of the original fee waiver request.

**C. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.**

The original fee waiver request established the important role of the requested documents in understanding what EPA’s actions:

So far as NWEA can tell, requested documents are not already in the public domain and so disclosure will necessarily lead to better understanding of EPA’s regulatory activities. Indeed, since 1998, very little information has been made publicly available regarding EPA’s view of the Coastal Nonpoint Pollution Control Program in Oregon. Consequently, absent disclosure of these records, the public is left largely to speculate about EPA’s regulatory role and the resulting and/or potentially unregulated environmental impacts. Given the complexity of the legal issues and the scarcity of publicly available information, the public’s understanding of government operations will be significantly greater after disclosure of the requested documents.

FOIA Request at 2. Having the information sought pursuant to this request is also “meaningfully informative” in that it ensures NWEA does not engage in frivolous or unfounded litigation, that NWEA can help the public understand what is or is not happening to ensure the consistency of regulatory programs with federal statutes, and it can demonstrate how EPA’s action pursuant to CZARA will contribute to the meeting the Congressional goals underlying that statute.

**D. Whether disclosure of the requested information will contribute to “public understanding.”**

As discussed above under Section A above, the original fee waiver request demonstrated that NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals who are most likely to use the information contained within the records. In its request, NWEA established its ability and expertise to review the requested documents, its ability and inclination to disseminate the material, and its connections with representatives of nonprofit organizations, dischargers, government officials, media representatives, and agency staff and management who would be interested in the material. NWEA has previously sued EPA with regard to its ability to conform to CZARA, the underlying statute at issue in this request.

As we previously demonstrated, NWEA is a public interest watchdog group that uses agency records that concern EPA policies and decisions to advocate for, *inter alia*, clean water by participating in the development of national policy through meetings and comment letters; by participating in the development of state water quality programs through advisory committees, comment letters, and other forms of advocacy (e.g., encouraging state legislatures to not overturn water quality standards, participating in public hearings); by participating in the EPA review of aspects of state water quality programs through comment letters and litigation; and by participating in the development of a stronger national base of public participation to support effective water quality programs by sharing information in the form of memoranda with other public interest organizations, sharing litigation briefs and formal comment letters, participating in meetings, working one-on-one with other organizations, working with media representatives, preparing petitions to government agencies, and posting information and EPA records directly to

NWEA's website. NWEA also frequently provides information and government documents to representatives of the media, both for background and for attribution. *See, e.g.,* Matthew Preusch, The Oregonian, *Oregon held to account for failing to protect coastal waterways* at [http://www.oregonlive.com/environment/index.ssf/2010/01/oregon\\_held\\_to\\_account\\_for\\_fai.html](http://www.oregonlive.com/environment/index.ssf/2010/01/oregon_held_to_account_for_fai.html).

**E. Whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities.**

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities of the EPA, its interactions with state regulatory agencies, and its compliance with federal statutes. Without the requested documents, NWEA cannot fully understand and prepared for EPA's proposed action on Oregon's coastal nonpoint program, slated for public comment on or before November 15, 2013. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking and other oversight of state programs, and in litigation. Only by understanding the EPA's actions and inactions can NWEA meaningfully participate in its public oversight watchdog function and assist other organizations to do the same.

**F. Commercial interests.**

NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of the requestor do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis that we may perform on the records sought.

**II. Appeal of Denial of Request for Expedited Processing**

In its FOIA request, NWEA sought expedited processing on the basis that

NWEA is engaged in disseminating information to the public and there is an urgent need to inform the public about the proposed CZARA decision that EPA and NOAA will issue on November 15 for public comment. As noted above, EPA and NOAA are required by a settlement agreement in *Northwest Environmental Advocates v. Locke, et al.*, Civil No. 09-0017-PK, to issue a proposed decision approving or disapproving Oregon's Coastal Nonpoint Pollution Control Program (“CNPCP”) by November 15, and to issue a final decision on Oregon's program by May 15, 2014. EPA and NOAA will be taking public comment on the proposed action and requestor NWEA intends to provide its views to EPA and NOAA on the proposed action as well as to urge the public, other organizations, and local governments similarly concerned about nonpoint source pollution in coastal watersheds of Oregon to comment. There is an urgent and compelling need for NWEA to have access to the requested records in time for it to read and evaluate the material in order to better understand the proposed action and to provide its views within the public comment period both to the federal agencies and to the public. As stated above, NWEA is seen as a key source of information by the public concerning the Oregon CNPCP. If EPA does not expedite the processing of this request and disclose these records before

finalizing the proposed decision, it may prevent the public from fully participating in the proposed action and may prevent the requestor from effectively informing the public about the proposed action. In accordance with 5 U.S.C. § 552(a)(6)(E)(vi) and 40 C.F.R. § 2.104(e)(3), attached hereto is a certified statement of an employee of NWEA whose professional activity includes information dissemination.

EPA's denial of our request for expedited processing is as follows: "you have not demonstrated that the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual[.]" EPA misreads the statute and regulations governing such requests. FOIA provides that each agency shall provide for expedited processing of records where there is a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i). The statute does not define "compelling need" as relating solely to the "life or physical safety of an individual." Further, EPA's FOIA regulations state that requests "will be taken out of order and given expedited treatment whenever EPA determines that such requests or appeals involve a compelling need" such as "[a]n urgency to inform the public about an actual or alleged Federal government activity, if the information is requested by a person engaged in disseminating information to the public." 40 C.F.R. § 2.104(e)(1)(i); *see also* 5 U.S.C. § 552(a)(6)(E)(v) (statutory definition of "compelling need"). EPA's FOIA regulations similarly do not limit compelling need to solely where there is an imminent threat to the life or physical safety of an individual. Moreover, EPA's regulations specifically do cite to an "urgency to inform the public," the basis upon which the expedited processing request was made and to which EPA has provided no response. EPA's response is not reasonably calculated to put NWEA on notice as to the deficiencies in its request because EPA's response wholly fails to address the basis of the request and the EPA regulations that govern the request. The basis of NWEA's request is that it will be participating in a public process starting on or about November 15, 2013 in which a public record will be established. Failure to obtain the requested documents by that date will result in limitations to establish a record in the administrative process which could jeopardize NWEA's rights in future litigation should EPA decide to approve Oregon's coastal nonpoint program.

## **Conclusion**

In conclusion, for the reasons set forth above and in the additional materials filed herewith, NWEA is clearly entitled to receive a public interest fee waiver for the above-listed FOIA request and hereby seek a reversal of the fee waiver denial made on July 19, 2013. Additionally, NWEA is entitled to obtain expedited processing due to its showing of compelling need.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell", with a stylized, flowing script.

Nina Bell  
Executive Director